STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 9544
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare to recoup from her ongoing ANFC benefits a prior overpayment at a rate of 10% a month. The issue is whether the department's rate of recoupment constitutes an abuse of its discretion.

FINDINGS OF FACT

The facts are not in dispute. The petitioner, in 1989, received an overpayment of ANFC benefits totaling $1,258.00. On November 16, 1989, the department notified the petitioner that effective December, 1989, it would withhold 10% of the petitioner's ongoing ANFC benefits until the overpayment was recouped in its entirety.

The petitioner does not contest the fact that she was overpaid $1,258.00 in ANFC benefits, and that state and federal regulations require the department to recover it through a reduction in her ongoing benefits (see infra). The petitioner maintains, however, that the 10% recoupment rate that the department applies "across the board" to all overpaid ANFC households imposes a severe financial hardship on her, and that the department, as a matter of law, is required to at

least consider that hardship in determining the rate at which it chooses to recoup overpaid benefits from her.

ORDER

The department's decision is affirmed.

REASONS

42 U.S.C. ə 602(a)(22)(A), provides that all ANFC overpayments be recouped, ". . . except that such recovery shall not result in the reduction of aid . . . such that the . . . family's . . . income . . . is less than 90 percent of the amount (of ANFC) payable . . . to a family of similar composition with no other income . . . " The federal and state regulations (see infra) reflect this language. 45 C.F.R. ə 233.20(a)(13)(A)(2) and W.A.M. ə 2234.2.

The Board agrees with the petitioner that the "plain meanings" of the federal statute and regulations allow a state to consider the question of individual (recipient) circumstances in establishing its regulations and procedures vis-a-vis recoupment of AFDC (ANFC) benefits. A majority of the board cannot agree, however, that either the statute or the regulation requires, or even encourages, states to exercise this option.

At the time the statutory amendments were implemented (1982), the federal agency (HMS) published the following comment prior to its promulgation of 45 C.F.R. ə 233.20(a)(13)(A)(2):

> The statute and regulations explicitly define the maximum that a State may recover each month. States are free to establish varying recovery rates less than the maximum rate as long as the recovery is prompt. If more than one rate is established the State must define the criteria for applying the rates and assure that they are applied equitably and on a statewide basis.

47 F.R. 5671-2 (5/5/82). It is thus clear that states are empowered to set varying recoupment rates. Vermont's regulations regarding overpayments are contained in Welfare Assistance Manual (WAM) ə 2234.2. In pertinent part, they provide:

> Recoupment shall be made each month from any gross income (without application of disregards), liquid resources and ANFC payments so long as the assistance unit retains from its combined income no less than 90% of the amount payable to an assistance unit of the same composition with no income.
>
> If, however, the overpayment results from Department error or oversight, the assistance unit must retain from its combined income no less than 95% of the amount payable to an assistance unit of the same composition with no income. For assistance units with no other income, the amount of the recoupment will equal 5% of the grant amount.

The petitioner in this matter concedes that the overpayment of ANFC she received was not caused by the Department's error or oversight. However, she maintains that W.A.M. ə 2234.2 (supra) requires the Department to at least consider her individual circumstances in deciding whether a less-than-10% recoupment rate is appropriate. The Department argues that the intent of ə 2234.2 is to recoup at a 10% rate in <u>all</u> non-department-error cases.

Certainly, history supports the Department's position. There is no allegation or indication that the Department

has ever acted at variance with the flat 10% recoupment policy in non-department-error cases. In 1982, the Board noted as much in a decision upholding the flat 10% rate in a case, like here, in which the petitioner alleged personal hardship. Fair Hearing No. 5076.[1] While the Department can, and should, be faulted in never amending W.A.M. ə 2234.2 to clearly indicate a flat 10% recoupment policy, the majority of the Board is nonetheless unpersuaded that the regulation as written or due process considerations require the Department to undertake further consideration of the petitioner's claim of personal hardship. In fact, if the Department were to do so, an incongruous result would follow.

Under W.A.M. ə 2234.2 (supra) there is no question that a flat 5% is to be recouped in all department-error overpayment cases in which the family's sole source of income is ANFC--regardless of any other considerations, including hardship (". . .the recoupment will equal 5% of the grant amount"). Clearly, the Board would have no basis whatsoever to require the Department to consider individual hardship in these cases. Although the rate of recoupment in department-error cases is less to start with, it strikes the Board as inherently inharmonious, if not inequitable, to consider individual hardship only in client-error cases.[2]

According to the petitioner's research, only eight other states besides Vermont allow any variation in

overpayment recoupment rates below 10%. Of these, three (California, Iowa, and Oklahoma) distinguish only between client-error and agency-error cases--with no apparent consideration of individual hardship. Two states (Wisconsin and Florida) have a less-than-10% recoupment rate for all cases--with no distinctions for either agency/client error or individual hardship. One state (Minnesota) sets recoupment rates of 5% in client-error cases and 1% in agency-error cases. Although the language of the Minnesota regulations is similar to Vermont's in that the rates appear to be maximum rather than absolute, there is no indication that Minnesota in fact allows a less-than-5% rate in any client-error case.[3]

The state of Washington sets a mandatory 10% recoupment rate in all client-error cases, but appears to allow varying recoupment of 5% or less in cases of agency-caused overpayments. A hearing decision from that state submitted by the petitioner seems to establish that in an agency-error situation individual hardship can be taken into account in establishing a less-than-5% rate. (See Petitioner's Memorandum, Appendix 2.) The Washington model, however, does not support the argument of the petitioner herein. Washington, by regulation, appears to allow consideration of hardship--but only in agency-error cases. Based on the petitioner's reading of the Vermont regulations, consideration of hardship could be considered only in client-error cases. As noted above, this would be

incongruous.[4]

New Jersey appears to be the only state that by regulation expressly allows consideration of hardship in recoupment determinations. It also appears that no distinction is made in that state between client-error or agency-error overpayments. Because Vermont does make such a distinction, and because Vermont clearly does not allow varying recoupment rates in agency-error cases, the New Jersey model is not analogous.

It must be concluded, therefore, that the petitioner's argument is unsupported by the experience or policy of any other state. As a practical matter, the Board agrees with the Department that establishing an individualized hardship-based recoupment system would be an administrative nightmare and would be virtually impossible to adjudicate on a consistent and equitable basis.

This is not to say that the Department should not (as it is clearly allowed to do, and which other states have done) consider the hardship of all families on ANFC, and amend its regulations to lower the recoupment rates in all overpayment cases. However, based on the regulations as presently written, it cannot be concluded that statutory, due process, or policy considerations require the Department to consider the individual hardship of individuals, like the petitioner, whose overpayments result from their own error or oversight. For these reasons, the Department's decision is affirmed.

FOOTNOTES

[1]In Fair Hearing No. 5076, the Board, in dicta, suggested that the Department change its recoupment policy in a flat rate appeared to operate as a disincentive for recipients to seek and/or maintain employment. Obviously, the Department did not heed this suggestion.

[2]It can be argued that a 5% recoupment rate in department-error cases is required only when the family has no income other than ANFC; and that when there is other income, a less-than-5% rate can be considered. This, in fact, would be consistent with the Board's dicta in Fair Hearing No. 5076 (see footnote 1, supra. Inasmuch, however, as the petitioner in this matter does not have income other than ANFC, it would be incongruous to consider her hardship in repaying an overpayment that was her fault when the regulation would clearly prohibit such consideration were she not at fault. Whether or not individual hardship or employment incentive must be considered in department-error cases in which the family has income other than ANFC is an issue not raised by the instant case and one which need not be considered at this time. (In Fair Hearing No. 5076, it appears that the overpayment was also caused by client, not department, error.)

[3]The Board assumes that Minnesota never recoups at less than the 1% rate in agency-error cases.

[4]It is this resulting incongruity that distinguishes this case from the analysis used by the Vermont Supreme Court in the recently-decided case of Slocum et al. v. DSW, Nos. 88-338 and 88-589 (June 29, 1990).

# # #